Office Supreme Court, U.S.
FILED
AUG 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota

BRIGGS AND MORGAN
First National Bank
Building
St. Paul, Minnesota
Attorneys for Petitioner

CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

INDEX

	Page
I. Opinions below	1
II. Jurisdiction	2
III. Questions presented	2
IV. Statutes and regulations involved	4
V. Statement of case	5
VI. Reasons for granting the writ	6
Conclusion	23
Appendices	A-1—E-3

CITATIONS

CASES:

Clearfield Trust Co. v. United States,
318 U.S. 363 (1943) 7, 17, 18, 19

Meyer v. United States,
84 S. Ct. 318 (1963) 3, 7, 14

Mutual Benefit Life Ins. Co. v. Canby Investment Co.,
190 Minn. 144, 251 N.W. 129 (1933) 16

Reconstruction Finance Corporation v. Beaver
County, 328 U.S. 204 (1946) 7, 14

United States v. Brosnan,
363 U.S. 237 (1960) 3, 7, 14, 15

United States v. McCabe Co.,
261 F. 2d 539 (8th Cir. 1958) 19

United States v. Queen's Court Apartments, Inc.,
288 F. 2d 253, 296 F. 2d 534 (9th Cir. 1961) 7, 11, 12

PAGE

United States v. Union Livestock Sales Co., 298 F. 2d 755 (4th Cir. 1962) 7, 13, 20

United States v. View Crest Garden Apartments, Inc., 268 F. 2d 380 (9th Cir. 1959), 281 F. 2d 844 (9th Cir. 1960) 7, 11

STATUTES:

12 U.S.C. § 1736(a) 4, 8, 9

12 U.S.C. § 1743(c) 16

15 U.S.C. § 714b(g) 8

28 U.S.C. § 1254(1) 2

Minn. Stat. Ann. § 599.17 ..... 4, 16

REGULATIONS:

1949 C.F.R. § 280.18 ..... 4, 9

1949 C.F.R. § 282.2(c) 4, 10

1949 C.F.R. § 282.8(b) 4, 10

MISCELLANEOUS:

Economic Almanac, 1964 20

Mishkin, *The Variousness of Federal Law*, 105 U. Pa. L. Rev. 797 (1957) 22, 23

Sixteenth Annual Report, Housing and Home Finance Agency 18, 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. .....

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on May 28, 1964.

I

OPINIONS BELOW

The opinion of trial court has not been published in official reports, but may be found in Appendix A attached hereto. The opinion of the Court of Appeals for the Eighth Circuit is reported at 332 F. 2d 1; and is appended hereto in Appendix B.

II

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was made and entered on May 28, 1964, and a copy thereof is appended to this petition as Appendix C. A petition for rehearing was denied by the Eighth Circuit Court of Appeals on June 23, 1964.

The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

This is an action to foreclose a mortgage upon *Minnesota real estate* consisting of an apartment house complex.

The mortgage was given by a *Minnesota corporation* to a New York corporation.

It was recorded in the Office of the Register of Deeds in and for Ramsey County, *Minnesota*, in accordance with the provisions of *Minnesota law* authorizing such recording.

The personalty was covered by the chattel mortgage given by the *Minnesota corporation* to the New York corporation.

The chattel mortgage was recorded in the Office of the Register of Deeds of Ramsey County, *Minnesota*, in purported compliance with *Minnesota law*.

Two modification agreements were executed by the parties and recorded with the Register of Deeds of Ramsey County in accordance with *Minnesota law*.

The assignment of the mortgage to the Federal Housing Administrator was recorded in the Office of the Register of Deeds of Ramsey County, *Minnesota*, in accordance with *Minnesota law*.

The complaint alleges (par. 12) that the Federal Housing Commissioner has a lien prior and superior to any other claims against the property described in the mortgage, thereby referring to, and necessarily relying upon, the authority of *Minnesota law* in accordance with the pronouncements of this Court in *United States v. Brosnan*, 363 U.S. 237 (1960), and in *Meyer v. United States*, 84 S. Ct. 318 (1963).

The plaintiff applied for the appointment of a receiver. The case presented to the trial court disclosed:

(a) The mortgage had not been foreclosed.

(b) No accounting had ever been furnished to the mortgagor by respondent, showing the amount of claimed default, nor application of funds paid by Chester Park.

(c) There was no evidence of the amount of the reserve for replacement.

(d) There was no evidence indicating:*

(i) Inadequacy of security;

(ii) Waste;

(iii) Insolvency or other jeopardy to respondent's interest;

(iv) Level of occupancy, vacancy, income, rental rates or profits; or

(v) The condition of repair.

[Petitioner was at all times prepared to offer evidence to show that there was in fact no inadequacy of security, waste or insolvency, and that the property was in excellent repair and nearly fully occupied.]

---

*Certain of these deficiencies were attempted to be supplied by the affidavit of Patrick J. Foley, included in the record presented to the Court of Appeals. All were flatly contradicted by the counter affidavit contained in the trial court's file, excluded from the record presented to the Court of Appeals, set out in Chester Park's brief there, and reproduced as Appendix D.

It has at all times been conceded by respondent that Minnesota law would prohibit the appointment of a receiver in this case.

On the basis of the foregoing, the District Court denied the application. The Eighth Circuit reversed and ordered the appointment of a receiver "forthwith."

This case presents the single question: May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:

(i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;

(ii) such provision is invalid and unenforceable under the law of the situs; and

(iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?

IV

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the federal statute, 12 U.S.C. §1736(a); the Minnesota statute, M.S.A. §559.17; and the FHA regulations, 1949 C.F.R. §§ 280.18, 282.2(c), and 282.8(b), are printed in Appendix E.

The federal statute defines mortgage in terms of the law of the state of the situs of the real estate.

The Minnesota statute by its terms and by judicial construction prohibits the appointment of a receiver pending and after foreclosure, and during the period of redemption.

The governing regulations limit the FHA to relief consistent with local law.

V

STATEMENT OF THE CASE

On July 1, 1950, petitioner executed a mortgage and chattel mortgage in favor of Manufacturers Hanover Trust Company to secure a debt of $1,328,400. The mortgage was insured by the FHA pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743. On September 18, 1963, the mortgagee assigned the mortgage note and the security instruments to the Federal Housing Commissioner pursuant to Section 608(c), 12 U.S.C. 1743(c). On November 19, 1963, respondent commenced a mortgage foreclosure action on behalf of the Federal Housing Commissioner, invoking the jurisdiction of the District Court pursuant to Title 28 U.S.C. §1345. It was alleged that default had occurred in the terms of the mortgage, and the complaint prayed for foreclosure of the security instruments, sale of the property and the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings.

A separate application for the appointment of a receiver pending the foreclosure proceedings was based upon the following term contained in the mortgage itself:

> "[The mortgagee] shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises * * * such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage."

On March 19, 1964, the District Court entered an order refusing to appoint a receiver, and certifying that the question was appropriate for interlocutory appeal. The Eighth Circuit Court of Appeals permitted such an appeal to be prosecuted.

By order of the Court of Appeals, the case was advanced on the calendar and was argued on May 20, 1964. The opinion of the Eighth Circuit was rendered on May 28, 1964, reversing the order of the District Court and ordering the appointment of a receiver "forthwith" with power to collect the rents, issues, and profits of the mortgaged premises.

In reversing the order of the District Court, the Court of Appeals held that federal law governed the enforceability of the FHA insured mortgage. In so doing, the Eighth Circuit expressly stated that the issue before it was "whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings." The respondent had conceded that under Minnesota law the mortgage provision here in question would be unenforceable.

VI

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals should be reviewed because the decision:

Erroneously construes the applicable federal statute and disregards the controlling regulations;

Creates a conflict between the decisions of the Ninth Circuit* and the decision here sought to be reviewed, on the question whether there must be facts warranting the appointment of a receiver or whether one will be granted on mere application;

Creates a conflict between the decisions of the Ninth Circuit* and the decision here sought to be reviewed, on the one hand, and the decision of the Fourth Circuit;** on the issues of the applicability of federal law and the need for uniformity of application;

By assuming the applicability of a "federal law" where none exists, has decided a federal question in conflict wth applicable decisions of this Court***;

Decided an important question of federal law, i.e., whether the "federal law" is in any way applicable in this matter, in itself an important question of federal law, which has not, but should be, decided by this Court;

Has decided an important question of the law of Minnesota in a way in conflict with Minnesota law, by completely disregarding that law and reaching a result undeniably prohibited under it;

Overrides "concepts of real property [which are] deeply rooted in state traditions, customs, habits and laws" in violation of the relevant principles declared by this Court in *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946);

Erroneously construes this Court's determination in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), to mean that wherever there is a federal interest in any degree, governing state law must be disregarded;

On the pretext of providing for uniformity, has in fact created chaos by requiring the application of a non-existent body of federal law;

Has thrust upon the federal courts generally and ultimately cast upon this Court the burden of legislating

*In the cases of *United States v. View Crest Garden Apts., Inc.*, 268 F. 2d 380, *cert. denied*, 361 U.S. 884 (1959), and 281 F. 2d 844, *cert. denied*, 364 U.S. 902 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253 and 296 F. 2d 534.

**In *United States v. Union Livestock Sales Co.*, 298 F. 2d 755.

***E.g.: *United States v. Brosnan*, 363 U.S. 237; and *Meyer v. United States*, 84 S. Ct. 318 (1963).

a body of federal mortgage law, where none presently exists; and

Has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision, in that it has peremptorily reversed the determination of the trial court in a matter which rests exclusively in the sound discretion of that court.

1. The decision erroneously construes the applicable federal statute and disregards the controlling regulations.

The statute, regulations, and mortgage here involved dictate the application of state law.

a) Congress has made no provision for the application of a "federal" law. Rather, the statute itself speaks in terms of state law. The provisions which are applicable to rental housing insurance begin at 12 U.S.C. 1736(a), where it is stated:

> "The term 'mortgage' means a first mortgage on real estate, in fee simple * * * and the term 'first mortgage' means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, *under the laws of the State in which the real estate is located* * * *." (Emphasis added.)

The Congress has adequately evidenced its intention to make uniform the application of rules in an analogous situation: that of the grain storage program supervised by the Commodity Credit Corporation. The statute, 15 U.S.C.A. 714b(g) states in part:

> "State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that

> such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements."

Congress has thus amply demonstrated that it knows how to proscribe the application of state law. By 12 U.S.C. 1736(a) it has made it equally clear that it knows there are applicable state laws. Presumably it also knows that they differ from state to state. The initial reference here is made by Congress itself to *state* law. Nothing appears to indicate an intention by Congress to make any other reference, to deny the applicability of state law, or to prescribe the application of a "federal law."

b) The mortgage note makes no reference to any law. The mortgage itself makes various references to the National Housing Act but states on the last page thereof:

> "[T]he Mortgagor hereby authorizes and empowers the Mortgagee to sell the mortgaged premises at public auction and convey the same to the purchaser in fee simple *in accordance with the statutes of Minnesota*, and in any such proceeding the Mortgagor agrees to pay all reasonable charges, including maximum attorney's fees, prescribed by statute. * * *" (Emphasis added.)

c) The Commissioner has issued elaborate regulations governing the insuring function. The relevant provisions provide in part as follows: Section 280.18, "*Rights and remedies of mortgagee in event of default or foreclosure.*"

> "The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered

by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.*" (Emphasis added.)

See also §282.2(c) which provides in part:

"The term 'mortgage' means such a first lien upon real estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or Territory in which the real estate is located*, together with the credit instrument or instruments, if any, secured thereby." (Emphasis added.)

Section 282.8(b) provides that the mortgagee shall be entitled to receive the benefits of the insurance if, upon failure by the mortgagor to make payment to the mortgagee or to perform obligations under the mortgage, the mortgagee within a period of 30 days after the occurrence of a default shall give notice in writing to the commissioner of such default. At any time within a period of 90 days after the date of such notice, the mortgagee at its election shall:

"either (1) * * * or (2) institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute and prosecute with reasonable diligence, *proceedings for the appointment of a receiver of the mortgaged property and the income therefrom*, or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction: Provided*, That *if the laws of the State in which the mortgaged*

property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings *within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws.*" (Emphasis added.)

From the foregoing, it clearly appears: Congress has recognized the applicability of state law, and has prescribed none of the aspects of a federal law; rather it has defined mortgage in terms of state law; the Commissioner has consistently recognized, unequivocally, the applicability of state law in every material respect.

The foregoing were before the Court of Appeals; the Court ignored the Congressional language and Commissioner's declarations. It held (without even reference to the Commissioner's clear statement that he was bound by local law) that federal law applies.

2. The decision is in basic conflict with decisions of the Courts of Appeals of the Ninth and Fourth Circuits and in conflict with decisions of this Court.

The decisions of the Ninth Circuit on the same matter are *United States v. View Crest Garden Apartments, Inc.*, 268 F. 2d 380 (1959), 281 F. 2d 844 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253, 296 F. 2d 534 (1961).

In each of those cases the critical question was whether, *assuming the applicability of federal law*, the facts warranted the appointment of a receiver. In the first *View Crest* decision, the Court of Appeals remanded the case for findings of fact. The second *View Crest* opinion considered whether the findings were adequate.

Queen's Court was also considered twice. The foreclosure action was tried in the District Court. Part of its decree required the FHA to pay to Queen's Court $27,213.22, constituting a reserve for replacement. After entry of the decree, the FHA moved the trial court for the appointment of a receiver. Before a hearing on the motion, the FHA appealed to have reviewed the portion of the decree requiring its payment to Queen's Court of the $27,213.22.

The District Court denied the appointment of a receiver on the ground that it lost jurisdiction when the appeal was filed.

The FHA moved the Ninth Circuit for appointment of a receiver. The Court noted (288 F. 2d at 254) that the facts warranted the appointment of a receiver [they would have warranted such an appointment under Minnesota law] and remanded with directions to appoint a receiver pending the appeal.

The second decision was devoted to the issue of the $27,213.22. There was raised incidentally the question whether the FHA was entitled to the appointment of a receiver only pending the appeal or during the entire foreclosure period. The Ninth Circuit held that a receiver was proper during the entire period. Although no mention is made of the facts which had been recited in the opinion written six months earlier, it is clear from a reading of both *Queen's Court* decisions that facts such as insolvency, lack of security and waste are required before a receiver will be appointed.

The decision of the Eighth Circuit was based upon the pleadings. No evidence was presented by Respondent indicating inadequacy of security, waste, insolvency of petitioner, low level of occupancy, or disrepair, and no findings on these matters were made by the District Court. Its effect is to say

that mere application for a receiver is all that is required, regardless of the facts. If, as the Eighth and Ninth Circuits have declared, and the FHA has everywhere contended, uniformity is the goal to be achieved, there is a complete lack of uniformity between the treatment to be accorded mortgagors in the Eighth and Ninth Circuits and a clear conflict in the basis for the decisions, which should be resolved by this Court.

If it is be understood from the decisions of the Eighth and Ninth Circuits, collectively, that it is the necessity for uniformity which forms the basis for the application of federal law, those decisions conflict with the policy announced by the Fourth Circuit in *United States v. Union Livestock Sales Co.*, 298 F. 2d 755 (4th Cir. 1962). That case raised the question of liability for conversion of an auctioneer which sold cows covered by chattel mortgages recorded in Ohio in favor of the Farmers Home Administration. The usual arguments about the necessity for uniformity were made. The Court said:

> "We find no need for uniformity in these transactions throughout the United States. On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759)

There is thus a clear conflict in basic philosophy between the Eighth and Ninth Circuits, on the one hand, and the Fourth Circuit, on the other.

The Fourth Circuit does not assume the answer to the crucial question. Rather, it requires some demonstration that uniformity is necessary even though the United States

is a party to a lawsuit involving "large scale transactions" of the federal government. The Eighth and Ninth Circuits short-cut the process drastically. It is assumed in these Circuits that the existence of a federal program and the presence of the United States in a lawsuit involving that program *ipso facto* dictates the disregard of governing local law and application of some "federal law."

Finally, the decision of the Eighth Circuit is in conflict with and completely disregards the principles enunciated by this Court in a number of cases, including *United States v. Brosnan*, 363 U.S. 237 (1960); *Meyer v. United States*, 84 S. Ct. 318 (1963); and *Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204 (1946).

The *Meyer* and *Brosnan* cases both declared that questions of property rights should be decided by the applicable state laws. In *Beaver County* this Court stated:

> "Concepts of real property are deeply rooted in state traditions, customs, habits, and laws."

See also *United States v. Brosnan*, 363 U.S. at 241-42:

> "We nevertheless believe it desirable to adopt as federal law state law governing divestiture of federal tax liens, except to the extent that Congress may have entered the field. It is true that such liens form part of the machinery for the collection of federal taxes, the objective of which is 'uniformity, as far as may be.' However, when Congress resorted to the use of liens, it came into *an area of complex property relationships long since settled and regulated by state law*. We believe that, so far as this Court is concerned, the need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed,

> if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. *We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or super-imposing on them a new federal rule.*" (Emphasis added.)

The decision of the Eighth Circuit strikes at the heart of of those concepts. Its disruptive effect should be reviewed by this Court.

3. The decision of the Court of Appeals should be reviewed because it erroneously determined an important question of federal law which has not been, but should be, settled by this Court.

The issue of federal law erroneously decided is the one basic to the controversy: whether the courts should apply existing local law or formulate and then apply a law of their own creation. For want of a better description and because it appears ordinarily to be raised in federal courts, this choice in itself becomes a *federal* question. The issue is important; it should be settled.

Among the propositions which are fairly embraced within it are:

A. The decision should be reviewed because: (a) it has decided an important question of the law of Minnesota in a way in conflict with Minnesota law; and (b) it overrides "concepts of real property deeply rooted in state traditions, customs, habits and laws."

The FHA was not a party to the mortgage. *After its execution*, the mortgage was insured by the Federal Housing Com-

missioner pursuant to the provisions of Section 608 of Title VI of the National Housing Act, as amended (Title 12 U.S.C. 1743).

The mortgage states in part that the holder "shall be entitled to appointment of a receiver of the rents and profits of the mortgaged premises as a matter of right * * * such rents and profits being hereby expressly assigned * * *." Were this a case between the original parties to the mortgage, there is no doubt but that the quoted provision would be invalid and unenforceable. Minnesota Statutes Annotated §559.17 provides:

> "A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure."

The Minnesota Supreme Court has held on numerous occasions that a provision, the enforcement of which results in a partial foreclosure or allows the mortgagee to gain possession of or enjoy the rents and profits from the real estate, is void. See, *e.g.*, *Mutual Benefit Life Insurance Co. v. Canby Investment Co.*, 190 Minn. 144, 251 N.W. 129 (1933):

> "What is now 2 Mason Minn. St. 1927, §9572, providing that a mortgage is not a conveyance so as to entitle the mortgagee to possession without foreclosure, has been held effectually to prevent the mortgagor, at the time of executing the mortgage, from assigning the rents to the mortgagee for the purpose of applying the same against the principal or interest of the mortgage debt. (Citations omitted.) An assignment of rents for the purpose of applying the same to the principal of the mortgage is a partial foreclosure. It is a clear evasion of the fundamental, and now statutorily enacted principle of law that until the mortgage debt is due, until the mortgage has

> been foreclosed and until the period of redemption has run, unless extraordinary circumstances justify the appointment of a receiver, the mortgagor shall be entitled to the possession, enjoyment and full usufruct of the land."

The Minnesota cases make it clear that the policy prohibiting appointment of a receiver is strong, firm, and deeply rooted in the customs and traditions of this state.*

Respondent argued in its reply brief in the Court below that "had Manufacturers brought suit to foreclose the FHA insured mortgage, and moved for the appointment of a receiver pursuant to the express terms of the mortgage, federal law would similarly govern its right to such appointment." No authority has ever been cited for such a proposition.

Respondent has consistently maintained that the mere fact that the mortgage here involved is FHA insured mysteriously removes the rights and remedies from the well established rules of state law into a non-existent field of "federal law of mortgages." Reliance for this proposition stems from *Clearfield Trust Co. v. United States*, 318 U.S. 363, which rejected the application of state law to the commercial transaction there involved. That case does not hold, as respondent contended and the Eighth Circuit assumed, that each and every time the United States is a party to litigation, some existent federal rule must be applied, or formulated and then applied. Rather, the case merely stands for the proposition that *under certain circumstances*, state law must bow to federal law.

The basis for *Clearfield* are adequately clear:

---

*A finding of waste is essential to the appointment of a receiver in Minnesota. Mere showing of inadequacy of security or insolvency of the mortgagor, or the combination thereof, will not suffice under Minnesota law.

(1) The application of a "federal" law to the transaction there involved was simply the application of an existent common law merchant. In the instant case, however, the law of mortgages is almost entirely statutory and controlled by the law of the situs.

(2) *Clearfield* involved commercial transactions requiring uniformity to protect the funds of the United States. No such compelling reasons are present here. We are not here dealing with "public monies."

(a) These are public monies only to the extent that they are held by a public agency. They do not constitute contributions or appropriations by the federal government but are made up entirely of premiums paid on insurance policies. Petitioner has contributed in excess of $70,000 to the fund.

(b) According to the 16th Annual Report of the Housing and Home Finance Agency, the insurance program has been an extremely profitable one. The particular insurance fund into which respondent's premiums have been paid is the War Housing Insurance Fund (p. 143). The insurance reserves in that fund increased from December 31, 1960 to June 30, 1962 by $31,000,000 (p. 145). The estimated reserve requirements during the same period decreased from $68,000,000 to $46,000,000, and *the excess of insurance reserve requirements grew from $116,000,000 to $169,000,000* (p. 145). To speak about protection of the public treasury and maintenance of the integrity of the public monies, is at best misleading. This particular aspect of the FHA business is an extremely lucrative insurance business.

(c) The ambulatory characteristics of the commercial paper involved in *Clearfield* may well have required

> the application of a single uniform rule so as to avoid the "vagaries" of state law resulting from the location of the commercial paper at the time of suit. In the present situation, however, the property is fixed in its location so that respondent, at the time it insures a mortgage on the property, may acquaint itself with the law thus involved, and if it is determined to be adverse, may refuse to insure.

The doctrine of *Clearfield* should not be applied here.

B. The decision should be reviewed because it precludes uniformity, and has thrust upon the federal courts the burden of legislating a body of mortgage law.

Consistent with respondent's contentions below, the Court of Appeals decided that "federal law must be applied." It declared:

> "As we recognized in *McCabe*, *supra*, 261 F. 2d 539, the Supreme Court has consistently held that when the Government, acting pursuant to constitutional acts of Congress, enters into *large scale transactions requiring uniform administration*, 'questions of *right and liabilities must be uniformly determined by federal law.*'". (Emphasis supplied.)

This stated premise for the decision begs every question in the case, and the assumptions are wrong.

(1) "*large scale transactions.*" Large is a relative term. By some test, the number and size of mortgages possibly involved may be large. As demonstrated within, FHA's involvement in total mortgage financing is insignificant.

(2) "*requiring uniform administration.*" Uniformity certainly is not necessary merely because respondent says it is. The same cry for uniformity was recently presented in *United*

States v. Union Livestock Sales Co., supra, and usual arguments about the necessity for uniformity were made. The Court said:

> "We find no need for uniformity in these transactions throughout the United States. On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759.)

The FHA contends that it is engaged in a nationwide insurance business. So are a great variety of banks and insurance companies. Mortgages held by such institutions are governed by the laws of the various states in which the property is situated. Variations in such laws seem not to interfere with the orderly conduct of that business.

It was represented in brief to the Court below that by 1961 *all* FHA insured mortgages outstanding exceeded 6.5 billion dollars in face amount. At the same time, the total private mortgage debt exceeded 200 billion dollars.*

It can safely be assumed that at least the insurance companies insist upon some geographic diversification of mortgage holdings. If we assume that the 200 billion includes FHA insured mortgages, the net of non-FHA insured mortgages exceeded 194 billion dollars in 1961. Mortgagees holding that size investment somehow manage to accommodate themselves to variations in state law.

Uniformity is not a requisite to mortgage investment; it cannot be to mortgage insurance.

Economic Almanac, 1964, National Industrial Conference Board, pp. 172, 459.

Moreover, the claim of 6.5 billion FHA involvement is grossly exaggerated. In 1962, .31 of 1% of Title 608 units were in default, and only .06 of 1% of the units involved were being assigned to FHA.* If the units are roughly proportionate to dollars involved, FHA's concern is really only $3.9 million. If we assume that only 50% of the amount involved is realized in foreclosure, we are dealing with large scale concern of $1.95 million. Such a sum will hardly justify overthrow of the established property laws of the states.

(3) "*rights and liabilities must be uniformly determined by federal law.*" As noted, there is no requirement of uniformity. But that aside, it is clear that chaos, not uniformity, will result from application of federal law. The entire case for the application of a federal law is posited upon *Clearfield*. The Court there set aside the Pennsylvania rules applicable to negotiable instruments. It was immediately able to draw upon an existing body of federal common law merchant, well established in the federal courts prior to *Erie v. Tompkins*. But, to set aside the law of the situs of the land in a mortgage case leaves the court a void to fall back upon.

There is not now nor ever has been a federal law of mortgages. To apply a federal rule, there must be, initially, as many "federal laws" for each mortgage provision as there are federal district judges before whom the various questions arise. This case, so far, presents a single question: the right of the mortgagee to the appointment of a receiver. There are an infinite number of additional problems raising questions such as rights of reinstatement, rights of redemption, times and places of filing, priority over other liens, requirements of mortgage sale, rights of tenants, necessities of

*Housing and Home Financing Agency, op. cit., *supra*.

service and publication of notices of sale and foreclosure—the list is virtually endless.

Without statutory direction each federal district court must, by judicial fiat, carve out a common law of mortgages for its district. The best hope for "uniformity" would be in the adoption of the state rule of each jurisdiction where the case arose, thereby producing exactly the "uniformity" which the commissioner contemplated when he wrote Section 280.18 (Appendix E, *infra*) of his Regulations. Ultimately, uniformity may be produced by this Court.

The problem is among the many aspects of the federal-state controversy noted by Mishkin in *The Variousness of "Federal Law,"* 105 U. Pa. L. Rev. 797 (1957). The author stated at p. 813:

> "Now there are circumstances where the argument for uniformity depends for its cogency upon the probability of actually having a single nation-wide rule. Yet the fact is—presumably well-known to the legal profession—that such complete uniformity may be most unlikely as a matter of common law development: the only court in a position to assure that degree of uniformity—the United States Supreme Court—is so burdened with its present work that it is highly improbable that it could undertake effectively to develop detailed substantive rules for any area we are here considering. Yet the argument for 'uniformity' is made in a wide variety of contexts without any reference to this aspect of reality."

The full impact of the decision of the Court of Appeals is thus to create confusion where certainty now exists unless and until this Court can turn aside from consideration of cases worthy of its attention to legislate a law of mortgages.

I. The decision should be reviewed because the Eighth

Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

The case was decided upon the pleadings. No facts relating to insolvency, inadequacy of security, or waste appeared. No case was presented to the trial court which had held under any law, state or federal, that a receiver was appropriate even when provided for in the mortgage document. The trial court properly denied the appointment. The appointment (or denial thereof) of a receiver is a matter for the discretion of the trial court.

In the same state of the record the Eighth Circuit reversed. If discretion is involved in the ruling on the propriety of a receiver, it assumes the existence of some operative facts. The Eighth Circuit went beyond any precedent cited to it and has held that facts are not of consequence. A decision so vitally affecting the rights of this litigant and all others similarly situated and so at variance with established precedents should be reviewed by this Court.

CONCLUSION

It is recognized that the function of this petition is to present cogent reasons for review without discussion of the merits of the case. It is doubted whether such complete divorcement is possible. In any event, the following general comment upon the treatment of this case by the Court of Appeals is worthy of this Court's notice at this juncture:

It is not here represented that the case against the appointment of a receiver is so clear as to admit of no doubt. The question of the selection and application of a state or federal rule is an extremely difficult one. See Mishkin, *The Variousness of Federal Law*, 105 U. Pa. L. Rev. 797 (1957). The

complexities of the issue were detailed to the Court of Appeals in a lengthy brief which also raised substantial questions of the practical and legal effect of disregard of state law in a field so historically local as mortgages of real property, treated in detail the regulations which seemed to indicate local law application, examined the validity of the FHA's premises respecting the size of the federal involvement and the need for uniformity, analyzed the inapplicability of decisions of this Court relating to commercial transactions when applied to real property law, examined the scope and nature of the treatment by the courts of equity of the extraordinary and drastic remedies, and documented the existence of other available adequate remedies at law.

After advancement of the case at the request of respondent's counsel to permit argument as the last case of the term, the Court of Appeals issued its decision with great dispatch. On its face the opinion is peremptory.

On a review of the entire case this Court will find that there are serious, difficult questions involved which, because of their impact upon traditional rights and upon important aspects of the state-federal spheres of control, should be considered by this Court.

Respectfully submitted,

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota

BRIGGS AND MORGAN
First National Bank
Building
St. Paul, Minnesota
Attorneys for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-63-341

UNITED STATES OF AMERICA, *Plaintiff*,

vs.

CHESTER PARK APARTMENTS, INC., *Defendant*.

ORDER

The United States of America has filed a complaint alleging that Defendant, Chester Park Apartments, Inc., had executed a mortgage and mortgage note under provisions of the National Housing Act, and insured by the Federal Housing Commissioner. The Plaintiff charges a default in the payments under the note and mortgage and prays for judgment on the defaulted amounts and the entire balance and for an order foreclosing the security and subjecting the property to sale to satisfy the judgment, and for interim relief by way of appointment of a receiver to manage the property and to collect the rents and profits.

A hearing was held on Tuesday, February 25, 1964, on the prayer for interim relief and on an Application for Appointment of a Receiver. The Defendant had filed its Answer specifically and generally denying the fact of default, amount due, necessity and propriety of a receiver, and the standing of Plaintiff. During the hearing, both parties agreed and

stipulated that defendant has failed to make some payments since July 1, 1963 but defendant contends that the amount of default, if any, depends upon the application of the reserve for replacement.

In maintaining that by the terms of the mortgage, the Plaintiff is entitled as a matter of right to a receiver during the pendency of the action to foreclose, the Government cited *United States v. View Crest Garden Apartments, Inc.*, C.A. 9th Cir., 268 F. 2d 380 (1959), and *View Crest Garden Apartments, Inc. v. United States*, C.A. 9th Cir., 281 F. 2d 844 (1960).

The Defendant maintains that State law controls the appointment of a receiver in this action and cites *United States v. Kramel*, C.A. 8th Cir., 234 F. 2d 577 (1956), and *Ethel Meyer, Petitioner v. United States*, 84 S. Ct. 318 (1963). The instant mortgage provides for the receivership and the assignment of rents and profits during foreclosure as additional security. Such a provision is unenforceable under Minnesota law. Inasmuch as in this Circuit it is held that state law must be applied, *United States v. Kramel, supra*, it is obvious that, even though the Defendant is in some default, the Plaintiff is not entitled to a receiver.

Therefore, It Is Ordered, that the Application for Appointment of a Receiver be and hereby is denied.

The Court is of the opinion, however, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation. 28 U.S.C.A. 1292(b).

Dated: March 19, 1964.

EARL R. LARSON
Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,630

UNITED STATES OF AMERICA, *Appellant,*

vs.

CHESTER PARK APARTMENTS, INC., *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

[May 28, 1964]

Before VOGEL, MATTHES and RIDGE, Circuit Judges.

MATTHES, Circuit Judge.

The Government instituted an action on November 19, 1963, in the United States District Court, District of Minnesota, for the use, benefit and credit of the Federal Housing Commissioner, seeking certain relief, including the foreclosure of a mortgage on real estate, of a chattel mortgage on personal property, and the appointment of a receiver to take charge and possession of the encumbered property during the pendency of the action. On December 17, 1963, the Government filed an application for appointment of a receiver to take charge of the mortgaged real estate pending the outcome of the foreclosure action. Following a hearing, the court, by order dated March 19, 1964, denied the application for appointment of a receiver. Upon proper certification by the trial

court, and pursuant to 28 U.S.C.A. § 1292(b), we permitted the Government to appeal from this interlocutory order.

The background facts are disclosed by the complaint, exhibits forming a part thereof, and the answer thereto.

On July 1, 1950, Chester Park Apartments, Inc. (appellee) executed its mortgage note in the sum of $1,328,400 payable to Manufacturers Hanover Trust Company of New York, or its order. To secure payment of the note, appellee executed on the same date its mortgage upon real estate in Ramsey County, Minnesota, and as additional security, on March 15, 1952, appellee executed its chattel mortgage on certain personal property. On July 24, 1950, the loan evidenced by the note was insured by the Federal Housing Commissioner pursuant to the provisions of § 608 of Title VI of the National Housing Act as amended, Title 12 U.S.C.A. § 1743.

The complaint alleged and the answer denied that the note and security instruments were in default by reason of the failure of appellee to make installment payment due November 1, 1962, in accordance with the terms of the note; that Manufacturers Hanover Trust Company had exercised its option under the terms of its insurance contract with the Federal Housing Administration, and on September 25, 1963, assigned the note and security instruments to the Federal Housing Commissioner. The complaint further alleged that appellee was indebted to the Government in the following amounts:

> "(a) $1,103,994.80 as the unpaid principal balance due and payable as of November 1, 1963;
>
> "(b) $5,235.48 as unpaid interest on the said principal balance at 4% per annum accrued from the due date of the last payment made to Mortgage principal through October 31, 1963;

"(c) Interest on said principal balance at 4% per annum from November 1, 1963, until paid;

"(d) $3,455.91 as net advances for taxes;

"(e) $5.30 as unpaid interest on the said advances at 4% per annum through October 31, 1963;

"(f) Interest on said advances for taxes from November 1, 1963, until paid.

The Government premised its application for appointment of a receiver upon the mortgage, which provides in pertinent part:

"That the holder of this mortgage, in any action to foreclose, shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit, such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage, without regard to the value of the mortgaged premises or the solvency of any person or persons liable for the payment of the mortgage indebtedness. The Mortgagor for itself and any subsequent owner hereby waives any and all defenses to the application for a Receiver as above and hereby specifically consents to such appointment without notice, but nothing herein contained is to be construed to deprive the holder of the mortgage of any other right, remedy or privilege it many now have under the law to have a Receiver appointed. The provision for the appointment of a Receiver of the rents and profits and the assignment of such rents and profits is made an express condition upon which the loan hereby secured is made."

Appellee opposed the granting of interim relief and the appointment of a receiver, persuaded the trial court to hold

that resolution of the question depended upon local law, that the mortgage provision relied upon by the Government was unenforceable under Minnesota law, and to hold that "even though the Defendant is in some default, the Plaintiff is not entitled to a receiver."

The Government concedes that under Minnesota law the mortgage provision would be unenforceable. Thus, it becomes apparent that the issue before us is whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foregoing proceedings.

Initially, we look to federal law to ascertain the source of the law controlling the relation between the United States and the parties to the mortgage. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-367 (1943); *United States v. Allegheny County*, 322 U.S. 174, 183 (1944); *United States v. Kramel*, 8 Cir., 234 F. 2d 577, 580 (1956); *United States v. View Crest Garden Apts., Inc.*, 9 Cir. 268 F. 2d 380, 382 (1959), cert. denied, 361 U.S. 884 (1959). Thus, if Minnesota law is to be applied in the matter of appointing a receiver in this foreclosure proceeding, it is because Congress or the federal courts have adopted local law in the furtherance of federal policy and not because of the force of the Minnesota law itself. As enunciated in the cases, supra, inasmuch as this action arises under federal law, and jurisdiction does not depend upon diversity of citizenship, the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is inapplicable. However, state law is sometimes adopted to fulfill the federal policies involved. *Clearfield Trust Co. v. United States*, supra, 318 U.S. at 367.

In refusing to appoint a receiver, the trial court was motivated by our decision in *United States v. Kramel*, supra,

234 F. 2d 577, and held that the teachings of that case required the application of state law here. Because of vital factual differences, we conclude *Kramel* is not controlling. *Kramel* was an action for alleged conversion resulting from sale by a livestock commission company of an animal on which the Farmers Home Administration held a lien under a chattel mortgage. The case turned upon the efficacy of the lien as to a public livestock dealer who had no actual notice of the existence of the chattel mortgage. Thus, the key issue centered upon control of title to property—"a field of control which has always been regarded as peculiarly belonging to the States exclusively." 234 F. 2d at 582-583. Here, the appointment of a receiver during the pendency of the foreclosure action does not affect the title to the premises—such action does not go to the validity of the lien of the mortgage, but rather, it is a part and parcel of the remedy which arises only in default of the loan.

Although a contention urged by the Government in *Kramel* was focused upon the enforcement of rights of the Government under laws made on a nation-wide basis and in that regard *Kramel* is akin to the instant situation, nevertheless, as we recognized in *United States v. McCabe Company*, 8 Cir., 261 F. 2d 539, 544 (1958), which involved another federal program, "Kramel does not hold that under all circumstances federal rights must be determined upon the basis of state law."

The precise question presented herein was the subject of litigation in *United States v. View Crest Garden Apts., Inc.*, supra, 268 F. 2d 380. There, like here, the district court held that state law [Washington] applied and that under such law appointment of a receiver was not warranted. The court of appeals reasoned that federal law controlled, and reversed

and remanded for determination whether under federal law the facts warranted the appointment of a receiver.

No beneficial purpose will be served in re-enunciating the compelling reasons for holding, as did the Ninth Circuit, that federal law must be applied. What was said in that regard in *View Crest*, supra, 268 F. 2d 380, is applicable here. As we recognized in *McCabe*, supra, 261 F. 2d 539, the Supreme Court has consistently held that when the Government, acting pursuant to constitutional acts of Congress, enters into large scale transactions requiring uniform administration, "questions of rights and liabilities must be uniformly determined by federal law." 261 F. 2d at 543, citing *United States v. Standard Oil Company*, 332 U.S. 301 (1947); *United States v. Allegheny County*, supra, 322 U.S. 174; *Clearfield Trust Co. v. United States*, supra, 318 U.S. 363.

Additionally, it appears that two district courts in this circuit have recognized that federal law is to be applied in the appointment of a receiver and the disposition of funds by the receiver. *American National Insurance Company v. Smith*, N.D. Iowa, 197 F. Supp. 479 (1961) (Judge Graven); *United States v. Academy Apts, Inc.*, unreported, D. Minn., No. 580 Civil (Oct. 22, 1963) (Judge Nordbye). For cases which considered related questions, see also, *United States v. Sylacauga Properties, Inc.*, 5 Cir., 323 F. 2d 487, 491 (1963); *United States v. Heltz*, 6 Cir., 314 F. 2d 301, 303 (1963); *Pesaguarnano v. Allen Corporation*, 1 Cir., 267 F. 2d 550, 558 (1959); *American Houses, Inc. v. Schneider*, 3 Cir., 211 F. 2d 881, 882-883 (1954).

Encompassed within its second point, the Government urges that "this Court should remand the case to the district court with directions to appoint a receiver forthwith." This request is premised upon the Government's assertion that a

uniform federal rule is required where, as here, the Government—to protect its interest in a national program—seeks appointment of a receiver pursuant to the express terms of a mortgage, and that under such a rule—which has been promulgated—the Government is entitled as a matter of right to appointment of a receiver during the pendency of the foreclosure litigation. More precisely, the Government contends that once we have decided that federal law is controlling, our task is limited to enforcing the express terms of the mortgage agreement and that the enforceability of the provision for the appointment of a reciver is not dependent upon a showing of insufficiency of security or insolvency of the mortgagor. In so contending, the Government relies primarily upon two Ninth Circuit cases—*View Crest Garden Apartments, Inc. v. United States*, 281 F. 2d 844 (1960), cert. denied, 364 U.S. 902 (1960), and *United States v. Queen's Court Apartments, Inc.*, 296 F. 2d 534 (1961)—both of which had also been before the Ninth Circuit in prior instances. See, respectively, supra, 268 F. 2d 380; and 288 F. 2d 253 (1961).

In opposition, appellee maintains that in *View Crest*, supra, 281 F. 2d 844, the Ninth Circuit based its decision upon the district court's finding as to insolvency and insecurity, determined that as a matter of federal law *the facts of that case* warranted appointment of a receiver, but by no means held that the Government was entitled to the appointment of a receiver as a matter of right under the terms of the mortgage. As to the second *Queen's Court* opinion, supra, 296 F. 2d 534, appellee asserts that "although it is true that there is no mention of the inadequecy of security, insolvency of the mortgagor, disrepair of the buildings, and unoccupancy of the buildings, it cannot be doubted that the same factors

which led the Circuit Court to appoint a receiver [in the first *Queen's Court* case, supra 288 F. 2d 253] pending the appeal were present and dictated the appointment of a receiver pending foreclosure."

In its reply brief, the Government vigorously opposes appellee's interpretation of the *Queen's Court* cases, discounting the relevancy of the findings in the first *Queen's Court* case on the basis that "the receivership requested and granted in that preliminary proceeding was merely a temporary one" pending appeal, and did not involve the pendency of foreclosure proceedings. The Government contends that the second *Queen's Court* case is more akin to the case before us, and notes that there, "the Ninth Circuit neither made findings regarding the current adequacy of the mortgage security or the current financial status of the mortgagor, nor directed the district court to do so before appointing a receiver."

We need not here decide whether the second *Queen's Court* holding stands for the proposition that under federal law the Government is entitled — in all instances — to the appointment of a receiver according to the terms of the mortgage provision as a matter of right, without need for further findings. Nor, need we establish an iron-clad rule demanding, ipso facto without additional determination, appointment of a receiver pursuant to a mortgage provision such as the one before us. However, taking cognizance of the entire record and the factual background, including the circumstance that in the past the Federal Housing Commissioner, to protect the interest of the Government, assumed temporary control and management of the mortgaged premises, and including the admission that appellee has failed to make payments on the mortgage since July 1, 1963, we do hold that here the

Government is entitled to have a receiver appointed during the pendency of the foreclosure proceeding.[1]

Accordingly, we reverse and remand to the district court with directions to appoint a receiver forthwith, "with power to collect the rents, issues and profits of said mortgaged premises, due and becoming due during the pendency of such foreclosure suit" in accordance with the mortgage agreement, to pay the necessary expenses therefrom, and to otherwise make disbursements, all under the orders and supervision of the district court.

Mandate to be issued forthwith.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

---

[1] In oral argument counsel for appellee advised that appellee has not made monthly payments on the loan of approximately $6,700 each, since July, 1963, although, according to counsel, appellee has been collecting approximately $8,000 per month as rents. It appears from counsel's statement that a dispute exists in regard to application of amounts held in reserve to amounts due on the loan. In any event, implicit in the district court's order denying appointment of a receiver is the finding that appellee is in default.

APPENDIX C

[JUDGMENT]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1963

No. 17630

UNITED STATES OF AMERICA, *Appellant*,

vs.

CHESTER PARK APARTMENTS, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and on the motion of appellant for interim relief, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court of March 20, 1964, denying appointment of a receiver, in this cause, be, and the same is hereby, reversed without cost to either party in this Court.

It is further ordered and adjudged by this Court that this cause be and the same is hereby remanded to the said District Court with directions to appoint a receiver forthwith, "with power to collect the rents, issues and profits of said mortgaged

premises, due and becoming due during the pendency of such foreclosure suit" in accordance with the mortgage agreement, to pay the necessary expenses therefrom, and to otherwise make disbursements, all under the orders and supervision of the District Court.

And it is further ordered by this Court that the mandate in this cause issue forthwith to the said District Court.

May 28, 1964

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-63-341

UNITED STATES OF AMERICA, *Plaintiff,*
vs.
CHESTER PARK APARTMENTS, INC., *Defendant.*

AFFIDAVIT

State of Minnesota
County of Ramsey—ss.

D. D. Wozniak and Frank Hammond, being duly sworn, state as follows:

1. This affidavit is made in connection with a motion for the appointment of a receiver in the above entitled matter.

2. They are attorneys representing defendant, Chester Park Apartments, Inc.

3. Motion for the appointment of receiver was served on D. D. Wozniak on December 17, 1963.

4. Said D. D. Wozniak then asked affiant Hammond to participate with him in the immediate preparation of an answer and response to the motion. Affiant Hammond was engaged in legal matters out of the city until December 20.

5. The motion recites that the defendant is in default of answer. No such default in fact exists. See the letter of December 9, 1963, addressed to Mr. Patrick Foley, attached hereto as Exhibit 1, reciting an extension for time to answer.

6. In previous actions of this kind plaintiff has represented that the interest of the plaintiff is the interest of the Government of the United States and that, by implication, different rules apply to it than to ordinary litigants. In fact, plaintiff's only function at the outset was as insurer of an ordinary real estate mortgage on Minnesota real estate. As such insurer, it is entitled to no different treatment than any other private party engaged in the insurance business. That such is the official position taken from time to time by plaintiff, when it suits his purpose, is illustrated by letter, copy of which is attached as Exhibit H, relating to Sibley Manor, Inc., which was the subject of a similar action in Civil Action File No. 3-62-162. Attention is called to the characterization in said letter of the Federal Housing Administration as a "financial institution."

7. As pointed out in the answer on file herein, taxes are not in default but payment thereof awaits an abatement proceeding in Ramsey County, Minnesota.

8. Fire and extended coverage insurance is in full force and effect.

9. No waste is being committed on the property.

10. Under the National Housing Act, the Federal Housing Administration insures mortgages for all types of buildings. A premium of ½ of 1% is charged for such insurance. Such premiums are used as an insurance reserve for foreclosures. Records which affiants do not presently have but which can be produced at time of trial will show that there is a great net profit to FHA each year resulting from such insurance operations. Analysis of the facts, law and financial status demonstrate that the federal government is in fact engaged in the insurance business. It is not engaged in the construction, operation or management of such buildings.

Neither is it engaged in business as a mortgagee. A claim against such insurance fund provides no basis in law or in fact for disregarding the settled law of mortgages.

11. The complaint and the motion for the appointment of a receiver contain an assertion that the property in question has a fair market value of less than the outstanding indebtedness. Affiants are informed and state on information and belief that such is not the fact and that the value of the property is in excess of the encumbrances; that plaintiff will not in any event suffer damage from the failure of the appointment of a receiver.

12. Various efforts have been made by defendant to negotiate a settlement of this problem with the plaintiff, and extended discussions have been had looking in that direction. Defendant's officers have been advised that since the commencement of this action all such negotiations must be conducted with the office of the United States attorney. (See Exhibit III attached hereto.) Plaintiff's attorney, Mr. Patrick Foley, and defendant's attorney D. D. Wozniak have both been engaged in trial almost continuously since the commencement of the action so that no such negotiations have been possible.

13. Appointment of a receiver would embarrass the conduct of settlement negotiations.

14. It is the earnest desire of the officers and holders of common shares of defendant corporation to negotiate a suitable settlement of the matter, even if it requires investment of additional funds in the corporation by such shareholders. Such settlement would be in the best interests of plaintiff as well as defendant but can only be conducted with the greatest difficulty if a receiver were appointed.

15. There is a genuine controversy as to the existence of a default by virtue of the reserve for replacement as al-

leged in the answer. Until it has been determined that there is in fact a default, no motion for the appointment of a receiver is appropriate.

D. D. WOZNIAK
FRANK HAMMOND

Subscribed and sworn to before me this 20th day of December, 1963. — Notary Public, Ramsey County, Minn. My commission expires Oct. 31, 1967. (N.S.)

Exhibit I

December 9, 1963

Mr. Patrick Foley
Assistant U. S. Attorney
United States Court House
Minneapolis, Minnesota

Re: United States vs. Chester Park Apartments, Inc.

Dear Mr. Foley:

Pursuant to our conversation, you have graciously consented to an extension of time for answer in the above entitled matter.

I have had a preliminary discussion with my clients and I hope to have the Answer to you sometime next week.

I should like to state, however, that my clients are desirous of retaining ownership of this property and further desire to renegotiate the mortgage. It appears that the government did step in and operate this apartment for approximately two years during which time the government was unable to pay the existing obligations with current income.

We believe that if the mortgage is recast and the payments represent a more realistic approach to the income, this would be beneficial to the government.

I would appreciate your inquiring of the FHA as to the feasibility of said negotiation.

Thank you for your anticipated courtesy in this matter.

Yours very truly,

dcw:ghm D. D. WOZNIAK

Exhibit II

FEDERAL HOUSING ADMINISTRATION
WASHINGTON, 25, D. C.

Legal Division .
Please refer to RHL-F6 February 26, 1960
Bouthilet, Daubney & Swenson
1100 Pioneer Building
St. Paul 1, Minnesota

Attention: Mr. John C. Bouthilet
Re: Project No. 092-42153 CHM
Sibley Manor, Inc.
St. Paul, Minnesota

Gentlemen:

Reference is made to your letter of February 5, 1960, directed to Mr. Marsh Cunningham.

Obviously, the assignment of your client's mortgage to the Federal Housing Commissioner is not open to question by the mortgagor. Mortgages are proper subjects of purchase and sale between financial institutions in the ordinary course of business, and the instant mortgage is no exception.

Our Comptroller informs us that you have been billed in an amount which includes an accrual for taxes on the basis

of past assessments. Pending your submission of appropriate evidence from tax officials reciting reduced tax liability, the accrual rate will remain unchanged.

Your letter indicates there is a possibility that the mortgage may be brought current. We assume that our Comptroller's billings afford you adequate information as to the sum required for that purpose.

Very truly yours,
WARREN E. COX
Chief Counsel
Rental Housing Section
Legal Division
By M. M. SHOUSE
Assistant Chief Counsel

Exhibit III

December 10, 1963

Mr. Patrick Foley
Assistant U. S. Attorney
U. S. Court House
Minneapolis, Minnesota

Re: Chester Park Apartments, Inc.

Dear Mr. Foley:

I had a long discussion with Mr. Gabler today concerning the operation and past history of the Chester Park Apartments. I advised Mr. Gabler of my clients' interest in attempting to work out a payment schedule that would be beneficial to the government and would also serve to save the property for the corporation and also, eventually, to save the

many thousands of dollars of money which has been personally expended by the chief stockholder, Mr. Chester Tobin.

Mr. Gabler informs me that any negotiation of this kind must be initiated with you since once the matter is in your hands he is not allowed to interfere with this procedure.

I know that you are busily engaged in trial, as I am. It is my hope that I will finish the Butler case at St. Cloud on Thursday, December 19. Also, I am going overseas for a brief period of time after Christmas.

At any rate, when you get a chance please give me a call to see how our respective schedules can be worked out.

Thank you sincerely for your anticipated courtesy in this matter.

Yours very truly,

ddw:ghm

D. D. WOZNIAK

APPENDIX E

Statutes

12 U.S.C. §1736(a):

> The term "mortgage" means a first mortgage on real estate, in fee simple * * * and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located. * * *

Minnesota Statutes Annotated §559.17:

> A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure.

Regulations

1949 Edition, Code of Federal Regulations, §280.18:

> The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.* (Emphasis supplied.)

1949 Edition, Code of Federal Regulations, §282.2(c):

> The term "mortgage" means such first lien upon real estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or*

Territory in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby. (Emphasis supplied.)

1949 Edition, Code of Federal Regulations, §282.8(b):

If the mortgagor fails to make any payment to the mortgagee required by the mortgage, or to perform any other covenant or obligation under the mortgage, and such failure continues for the period of grace, if any, set forth in the mortgage, the mortgage shall be considered in default, and the mortgagee, within a period of thirty (30) days after the occurrence of a default arising on account of such failure to make any such payment or within such period after the mortgagee shall have knowledge of the occurrence of a default arising on account of such failure to perform any other covenant or obligation under the mortgage, shall give notice in writing to the Commissioner of such default. At any time within a period of ninety (90) days after the date of such notice or within such later time as may be agreed upon by the Commissioner in writing, the mortgagee, at its election, shall either:

(1) With, and subject to, the consent of the Commissioner, acquire by means other than foreclosure of the mortgage, possession of, and title to, the mortgaged property; or

(2) Institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute, and prosecute with reasonable diligence, *proceedings for the appointments of a receiver of the mortgaged property and the income therefrom* or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction*: *Provided, That*

if the laws of the State in which the mortgaged property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws. Nothing contained in this subsection shall be so construed as to require the mortgagee to take any action when the necessity therefor has been waived in writing by the Commissioner nor to prevent the mortgagee from taking action at a later date than herein specified provided the Commissioner so agrees in writing. The mortgagee shall promptly give notice in writing to the Commissioner of the institution of foreclosure proceedings under this subsection and shall exercise reasonable diligence in prosecuting such proceedings to completion. If after default and prior to the completion of foreclosure proceedings the mortgagor shall pay to the mortgagee all payments in default and such expenses as the mortgagee shall have incurred in connection with the foreclosure proceedings, notice thereof shall be given to the Commissioner by the mortgagee, and the insurance shall continue as if such default had not occurred. (Emphasis added.)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
1. The federal mortgage insurance program	2
2. The facts of this case	4
Argument	5
Conclusion	12
Appendix	13

CITATIONS

Cases:

American National Insurance Co. v. *Smith*, 197 F. Supp. 479 — 10

Bank of America v. *Parnell*, 352 U.S. 29 — 6

Clearfield Trust Co. v *United States*, 318 U.S. 363 — 6, 7, 8, 9

Meyer v. *United States*, 375 U.S. 233 — 8

R.F.C. v. *Beaver County*, 328 U.S. 204 — 8

United States v. *Allegheny County*, 322 U.S. 174 — 6

United States v. *Brosnan*, 363 U.S. 237 — 8

United States v. *Kramel*, 234 F. 2d 577 — 5, 8

United States v. *Queen's Court Apartments, Inc.*, 296 F. 2d 534 — 12

United States v. *Standard Oil Co.*, 332 U.S. 301 — 6

United States v. *Union Livestock Sales Co.*, 298 F. 2d 755 — 8

United States v. *View Crest Garden Apts., Inc.*, 268 F. 2d 580, certiorari denied, 361 U.S. 884 — 10

746-194 64 — 1

Cases—Continued

	Page
View Crest Garden Apts., Inc. v. *United States*, 281 F. 2d 844, certiorari denied, 364 U.S. 902	12

Statutes and regulations:

Federal Home Loan Bank Act, Section 2, 12 U.S.C. 1422	9
National Housing Act, as amended:	
12 U.S.C. 1713(k) (Section 207(k))	4, 10, 13
12 U.S.C. 1736(a) (Section 601(a))	9, 14
12 U.S.C. 1736–1746(a)	2
12 U.S.C. 1738(a) (Section 603(a))	3
12 U.S.C. 1742 (Section 607)	3
12 U.S.C. 1743 (Section 608)	2, 3, 4
12 U.S.C. 1743(b) (Section 608(b))	3
12 U.S.C. 1743(c) (Section 608(c))	4, 10, 14
12 U.S.C. 1743(f) (Section 608(f))	4, 15
24 C.F.R. 276–289 (1949 ed.)	3
24 C.F.R. 277–289 (1959 rev.)	3
24 C.F.R. 280.5–280.7 (1949 ed.)	3
24 C.F.R. 280.8 (1949 ed.)	3
24 C.F.R. 280.10 (1949 ed.)	3
24 C.F.R. 280.10–280.22 (1949 ed.)	3
24 C.F.R. 282.8 (1949 ed.)	4
24 C.F.R. 603–611 (1962 rev.)	3

Miscellaneous:

75 Cong. Rec. 14553–14554, 14560–14566	9
78 Cong. Rec. 11974	11
FHA, 28th Annual Report, (1961)	7

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

CHESTER PARK APARTMENTS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Court for the District of Minnesota (Pet. App. A-1—A-2) is not reported. The opinion of the Court of Appeals for the Eighth Circuit (Pet. App. B-1—B-9) is reported at 332 F. 2d 1.

JURISDICTION

The judgment of the court of appeals (Pet. App. C-1—C-2) was entered on May 28, 1964. The petition for a writ of certiorari was filed on August 21, 1964. The jurisdiction of this Court is invoked under 28 U.S.C.(1).

QUESTIONS PRESENTED

1. Whether, in an action by the United States to foreclose a war housing insured mortgage, federal law governs the right of the United States to enforce an express provision of the mortgage for the appointment of a receiver of the rents of the mortgaged property.

2. Whether the court of appeals correctly held that, in the circumstances of the case, the appointment of a receiver was warranted as a matter of federal law.

STATUTES INVOLVED

The relevant statutes are set forth in the Appendix, *infra*, pp. 13–15.

STATEMENT

This is a suit by the United States to foreclose a mortgage insured by the Federal Housing Administration (FHA) under authority of Section 608 of the National Housing Act, 12 U.S.C. 1743, and assigned to FHA upon the mortgagor's default (R. 1–8).[1]

1. *The federal mortgage insurance program.*—Since 1934, the United States, through its constituent agencies, and under authority conferred by the National Housing Act, has engaged in a comprehensive, nationwide mortgage insurance program. The insurance involved in the instant case was issued under Title VI of the Act (12 U.S.C. 1736–1746(a))—which was designed to increase the supply of reasonably priced housing available to World War II veterans

[1] "R. —" refers to the multilithed record which was filed by the government in the court of appeals, now on file in this Court.

(12 U.S.C. 1738(a))—and, specifically, under Section 608 (12 U.S.C. 1743), which provides for financing of large multi-family dwellings. The detailed procedure for obtaining such insurance is spelled out in the statute and in regulations promulgated by the Federal Housing Commissioner under Section 607 (12 U.S.C. 1742).[2] First, the mortgagee (after receiving prior formal approval of the FHA) must apply for mortgage insurance on the standard forms prescribed by FHA, giving required information concerning the project.[3] On approving the application, the FHA issues a commitment of insurance, setting out the terms and conditions under which the mortgage will be insured.[4] If the transaction meets all the eligibility tests prescribed by FHA, and the mortgage agreement is executed on an FHA form[5] containing all the required terms and conditions,[6] the mortgage is accepted for insurance. The statute provides that, in the event of default, the mortgagee may qualify for

---

[2] See 24 C.F.R., Parts 276-289 (1949 ed.). The 1949 edition of the Code of Federal Regulations contains the regulations for Title VI in force at the time the mortgage in the instant case was executed and insured, July 1 and July 24, 1950, respectively (see R. 1, 3, 14). Since they thus govern the mortgage insurance transaction in this case, these regulations will be cited throughout. Subsequent regulations under Title VI, including those currently in force, are contained in 24 C.F.R., Parts 277-289 (1959 rev.), and 24 C.F.R., Parts 603-611 (1962 rev.).

[3] 24 C.F.R., §§ 280.5-280.7 (1949 ed.).

[4] 24 C.F.R., § 280.8 (1949 ed.).

[5] 24 C.F.R., § 280.10 (1949 ed.).

[6] Section 608(b) of the Act, 12 U.S.C. 1743(b); 24 C.F.R., 280.10-280.22 (1949 ed.).

insurance benefits either by obtaining title to the property (by foreclosure or otherwise) and conveying it to FHA, or by transferring to FHA the mortgage itself.[7] If the mortgage itself is assigned, FHA is authorized to institute foreclosure proceedings and to exercise all the rights of the mortgagee under the mortgage agreement.[8]

2. *The facts of this case.*—On July 1, 1950, to secure a note of $1,328,400, the petitioner executed a mortgage and chattel mortgage in favor of Manufacturers Hanover Trust Company (R. 1–3, 14). On July 24, 1950, this transaction was insured by FHA under Section 608 in the manner described above, with both the note and mortgage executed on printed FHA forms.[9]

Upon the petitioner's default, Manufacturers assigned the note and security instruments to the Federal Housing Commissioner.[10] On November 19, 1963, the government brought this mortgage foreclosure suit on behalf of the Commissioner (R. 1–8). In addition to foreclosure of the security instruments, sale of the property, and, if necessary, the entry of a deficiency judgment, the complaint also requested interim relief in the form of the appointment of a re-

[7] Section 608(c) of the Act, 12 U.S.C. 1743(c); 24 C.F.R. § 282.8 (1949 ed.).

[8] Section 207(k) of the Act, 12 U.S.C. 1713(k), incorporated by reference into Title VI by Section 608(f), 12 U.S.C. 1743(f).

[9] The mortgage note and mortgage appear in the original record as Exhibits A and B, respectively (see R. 8).

[10] The assignments appear in the original record as Exhibits E and F (see R. 8).

ceiver to collect rents during the pendency of the foreclosure proceedings (R. 6–7). This request was based (see R. 5–6) upon the term of the standard-form FHA mortgage, which provides that in any mortgage foreclosure action the holder of the mortgage "shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged premises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises, * * * such rents, and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage * * *" (R. 8). The United States renewed its request for the appointment of a receiver in a separate application filed on December 17, 1963 (R. 9–13).

The district court entered an order refusing to appoint a receiver on the ground that State law governed (citing the Eighth Circuit's prior decision in *United States* v. *Kramel*, 234 F. 2d 577); and that under Minnesota law the mortgage provision authorizing such appointment was unenforcible. The court of appeals reversed and directed the appointment of a receiver.

ARGUMENT

The court of appeals held that the government's right to the appointment of a receiver, pursuant to the express terms of a war housing insured mortgage, is governed by federal, rather than State, law. That holding is plainly correct; it is in full accord with the controlling decisions of this Court and a decision

of the Ninth Circuit on the precise issue; and it is not in conflict with any other decision. Further review by this Court is unnecessary.

1. This Court has consistently recognized that where the United States enters into a large number of transactions requiring uniform administration, its rights and liabilities must be determined by reference to federal law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363; *United States* v. *Allegheny County*, 322 U.S. 174; *United States* v. *Standard Oil Co.*, 332 U.S. 301; cf. *Bank of America* v. *Parnell*, 352 U.S. 29.[11] The court below correctly applied this settled prin-

[11] Thus, in *Clearfield*, *supra*, State law was held inapplicable in an action by the United States on a check issued by the United States Treasury. "The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." (318 U.S. at 367).

United States v. *Allegheny County*, *supra*, represented an extension of *Clearfield* to cover all cases involving contracts entered into by the United States. "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State" (322 U.S. at 183).

And, in *United States* v. *Standard Oil Co.*, *supra*, the Court made clear that questions involving federal fiscal policy require "uniform national treatment rather than diversified local disposition" (332 U.S. at 311), and were therefore determinable by reference to federal law.

ciple in holding that federal law determines the government's right to appointment of a receiver in connection with foreclosure of an FHA insured mortgage which specifically authorized such appointment. The FHA, in insuring mortgages on multi-family rental housing for veterans, is carrying out an important part of the nationwide program of mortgage insurance authorized by the National Housing Act.[12] The particular standard mortgage provision involved here—which gives FHA the right to receive, as additional security for the mortgage, the rents coming due during the foreclosure proceedings—was designed to preserve the insurance funds which are used to finance the various parts of the program. In these circumstances, the desirability of a uniform rule is plain (cf. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 367). Otherwise the extent to which the government could realize on such security would vary from State to State, even though the same mortgage provision was involved. Indeed, if the government's right to a receiver were to depend upon the "vagaries of the laws of the several states" (*Clearfield* case, *supra*, p. 367), the result might be that projects in certain States, which otherwise met the requirements of

[12] The FHA's annual report for the calendar year 1961 shows that in that year the agency issued $4,765,216 of insurance on home mortgage programs, and $928,069 of insurance on project mortgage programs (FHA, 28th Annual Report, at p. 24). The face amount of mortgages and loans insured during 1961 exceeded $6.5 billion (*id.*, at p. 23).

the war housing mortgage program, would be rejected for want of adequate security.[13]

[13] There is no conflict, as petitioner contends (Pet. 14–15), between the holding below and this Court's decisions in *Meyer* v. *United States*, 375 U.S. 233, *United States* v. *Brosnan*, 363 U.S. 237, and *R.F.C.* v. *Beaver County*, 328 U.S. 204. In *Brosnan*, the Court adopted local law to resolve an issue concerning the divesture of junior federal tax liens. *Meyer* held that, absent a congressional expression to the contrary, State law should be applied to determine the priority of federal tax liens. And in *Beaver County*, the Court, feeling that Congress had not expressly indicated whether State or federal law was to govern the definition of "real property," held that the congressional purpose there involved could best be accomplished by adoption of local law. Since State law in these cases was applied not of its own force but because the Court felt such application was dictated by the federal policies there involved, the holdings are fully consistent with *Clearfield* and the case below, which involved consideration of a different federal objective.

Petitioner's claim of a conflict with *United States* v. *Union Livestock Sales Co.*, 298 F. 2d 755 (C.A. 4) is equally baseless. That case held, following the decision of the Eighth Circuit in *United States* v. *Kramel*, 234 F. 2d 577, that State law governs the liability in conversion of a livestock auctioneer who sells chattels which are subject to a Farmers' Home Administration lien. As heretofore noted, the Eighth Circuit recognized that the *Kramel* (and thus *Union Livestock*) question is quite distinct from that presented here. Apart from the fact that different statutes are involved, the considerations which led to the holdings that tort liability in conversion was a matter of State law hardly are dispositive of the issue of whether the government's right to a receiver in a foreclosure proceeding is to be resolved under federal law.

A Fifth Circuit decision, from which the government will shortly petition for certiorari, held that State law governed the question whether a married woman is protected by coverture from personal liability on a loan made by the Small Business

It is true that Section 601(a) of the National Housing Act (12 U.S.C. 1736(a), *infra*, p. 14) defines the term "first mortgage" as "such classes of first liens as are commonly given * * * under the laws of the State in which the real estate is located." Contrary to petitioner's contention (Pet. 8), however, that definition in no way evidences an intention to make all of the government's rights with respect to its mortgage interests dependent upon State law. The definition of "first mortgage" in Section 601(a) was taken from Section 2 of the Federal Home Loan Bank Act, 12 U.S.C. 1422. The legislative history of the latter Act indicates that the reference to State law was designed merely to ensure that all mortgage-type encumbrances on real estate, not junior to any prior lien, would be included within the category, whether denominated as "mortgages," "trust deeds," or as "liens" by State law. See 75 Cong. Rec. 14553–14554, 14560–14566. Moreover, while commercial convenience may well be served by requiring the use of instruments which create interests recognized by State law and thus

---

Administration under the Small Business Act of 1953. We think the Fifth Circuit's decision is aberrational and is inconsistent in principle with the whole line of cases applying the *Clearfield Trust* doctrine. But in any event, whatever argument can be made in favor of the applicability of the substantial State law of coverture to the liability of a married woman on a contract with the United States, we see no justification for a federal district court to resort to State procedures in adjudicating a mortgage foreclosure suit authorized by a federal statute to enforce the federally created rights of the United States.

familiar to persons in the community where the lien is to be recorded, altogether different considerations come into play in the event of default. At that point, "the sole situation presented is one of remedies. Commercial convenience in utilizing local forms and recording devices familiar to the community is no longer a significant factor. Now the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act—to facilitate the building of homes by the use of federal credit—becomes predominate." *United States* v. *View Crest Garden Apts., Inc.*, 268 F. 2d 380, 383 (C.A. 9), certiorari denied, 361 U.S. 884, holding, as did the court below, that federal law controls the enforcibility of the provisions of a standard FHA insured mortgage relating to the appointment of a receiver. See also *American National Insurance Co.* v. *Smith*, 197 F. Supp. 479, 489, 490 (N.D. Iowa).

Section 207(k) of the National Housing Act (*infra*, p. 13) further shows that Congress did not intend, by resorting to State law for the definition of first mortgage, to subject the government's right to foreclosure to the vagaries of State law. Section 608(c) enumerates certain acts which constitute a default, and Section 207(k) provides various remedies that the FHA can pursue, including the institution of foreclosure proceedings.[14] There is no indication that the right to obtain foreclosure is to be governed by State law.

[14] Section 207(k) is applicable to war housing insured mortgages.

The legislative history of the Act shows that Congress intended FHA to have authority to require whatever mortgage terms it deems necessary for the protection of the government's financial interest.[15]

The conclusion of the court below that, under federal law, the government was entitled to the appointment of a receiver does not conflict with the decisions of this Court, or other circuits, as petitioner contends (Pet. 11–15). The court below held merely that, in the circumstances of this case, the appointment of a receiver was warranted. Those circumstances included: (1) the record evidence that FHA had on a prior occasion been forced to assume temporary control and management of the premises to protect the government's interest; and (2) petitioner's admission that it had not made its monthly mortgage payments of $6,700 for the prior four months even though it

[15] In explaining the bill on the floor of the Senate, Senator Fletcher said (78 Cong. Rec. 11974):

> "In connection with the mutual mortgage insurance program provided for in title II, mortgages which are offered to the administrator within 1 year from the date of their execution are to be eligible for insurance *if they* are amortized and *comply with such further requirements as the administrator may prescribe with respect* to maturities, the application of periodic payments to the amortization of principal, and provisions with respect to insurance, repairs, alterations, payment of taxes, default reserves, delinquency charges, *foreclosure proceedings*, anticipation of maturity, additional and secondary liens, and other similar matters. * * *" [Emphasis added.]

Similarly, there is nothing in the regulations of the FHA upon which petitioner relies (Pet. pp. 9–11) to suggest an administrative understanding that the validity of the terms of standard form FHA insured mortgages is to be governed by local law.

had been collecting approximately $8,000 per month in rents. This narrow holding by the court in no way conflicts with the Ninth Circuit's decisions in *View Crest Garden Apts., Inc.* v. *United States*, 281 F. 2d 844, certiorari denied, 364 U.S. 902, and *United States* v. *Queen's Court Apartments, Inc.*, 296 F. 2d 534, both of which also upheld the appointment of a receiver in the circumstances there presented.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
JOHN W. DOUGLAS,
Assistant Attorney General.
ALAN S. ROSENTHAL,
FREDERICK B. ABRAMSON,
Attorneys.

OCTOBER 1964.

APPENDIX

The National Housing Act, 48 Stat. 1246, as amended, provides in pertinent part:

Section 207(k) [12 U.S.C. 1713(k)]

The Commissioner is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Commissioner shall so acquire possession of and title to the property by voluntary conveyance or institute foreclosure proceedings as provided in this section within a period of one year from the date on which any such mortgage becomes in default under its terms or under the regulations prescribed by the Commissioner: *Provided,* That the foregoing provisions shall not be construed in any manner to limit the power of the Commissioner to foreclose on the mortgaged property after the expiration of such period, or the right of the mortgagor to reinstate the mortgage by the payment, prior to the expiration of such period, of all delinquencies thereunder. * * * Pending such acquisition by voluntary conveyance or by foreclosure, the Commissioner is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as

may be necessary to preserve or protect the lien of such mortgage.

Section 601 [12 U.S.C. 1736(a)]

The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable; or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

Section 608(c) [12 U.S.C. 1743(c)]

The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage, and if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided, upon assignment, transfer, and delivery to the Commissioner, within a period and in accordance with rules and regulations to be prescribed by the Commissioner of, (1) all rights and interest arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagors or others, arising out of the mortgage transaction; * * * *Provided*, That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by the Commissioner, proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to

the Commissioner of title to the property which meets the requirements of the rules and regulations of the Commissioner in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations; and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Commissioner. * * *

Section 608(f) [12 U.S.C. 1742(f)]

The provisions of section 1713(k) of this title shall be applicable to mortgages insured under this section, except that as applied to such mortgages (1) all references in such section 1713(k) to the "Housing Fund" shall be construed to refer to the "War Housing Insurance Fund", and (2) the reference therein to "subsection (g)" shall be construed to refer to "subsection (c)" of this section.

U.S. GOVERNMENT PRINTING OFFICE: 1944

Office-Supreme Court, U.S.
FILED
OCT 19 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota 55101

BRIGGS AND MORGAN
First National Bank Building
St. Paul, Minnesota 55101
Attorneys for Petitioner

CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

INDEX

	PAGE
Statement of Case	1
Questions Presented for Review	2
Argument	3
Conclusion	12
Appendix A	13

CITATIONS

Cases:	PAGE
Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)	8
Meyer v. United States, 84 S. Ct. 318 (1963)	3
United States v. Brosnan, 363 U.S. 237 (1960)	3, 12
United States v. Helz, 314 F. 2d 301 (6th Cir. 1963)	4, 6
United States v. Queen's Court Apartments, Inc., 288 F. 2d 253, 296 F. 2d 534 (9th Cir. 1961)	3, 7
United States v. Union Livestock Sales Co., 298 F. 2d 755 (4th Cir. 1962)	3, 8
United States v. View Crest Garden Apartments, Inc., 268 F. 2d 380 (9th Cir. 1959); 281 F. 2d 844 (9th Cir. 1960)	3, 7
United States v. Yazell, 334 F. 2d 454 (5th Cir. 1964)	3, 4, 6
Regulations:	
1949 C.F.R. §280.18	10
1949 C.F.R. §282.2(c)	10
1949 C.F.R. §282.8(b)	10
Miscellaneous:	
Economic Almanac, 1964	9
Mishkin, *The Variousness of Federal Law*, 105 U. Pa. L. Rev. 797 (1957)	12
Sixteenth Annual Report, Housing and Home Finance Agency	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

STATEMENT OF CASE

This is an action to foreclose a mortgage upon Minnesota real estate consisting of an apartment house complex. The mortgage was given by a Minnesota corporation to a New York corporation. It was recorded in accordance with the provisions of Minnesota law authorizing such recording. Subsequent modifications were also recorded in accordance with Minnesota law, as well as the assignment of the mortgage to the Federal Housing Administrator. The case presented to the trial court consisted solely of the pleadings. No evidence was offered or received. It has at all times been conceded by

Respondent that the Minnesota statute, Minn. Stat. § 559.17, by its terms and by judicial construction prohibits the appointment of a receiver pending and after foreclosure, and during the period of redemption.

QUESTIONS PRESENTED FOR REVIEW

This case presents the single question: May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:

(i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;

(ii) such provision is invalid and unenforceable under the law of the situs; and

(iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?

ARGUMENT

Respondent opposes granting the petition for Writ of Certiorari and asserts as its sole reason that there is no conflict between the decision below and decisions of other Circuits or of this Court. The assertion finds no support in the cases. The Eighth Circuit's decision is in direct conflict with decisions of the Ninth Circuit,* the Fourth Circuit,** the Fifth Circuit,*** and the Supreme Court of the United States.****

1. The decision is in basic conflict with the decision of the Fifth Circuit in *United States v. Yazell*, 334 F. 2d 454 (5th Cir. 1964). This decision was filed on July 13, 1964, and was published in the Federal Reporter on September 14, 1964. Respondent has taken cognizance of its existence by producing a summary of the decision at the *end of a footnote* in its Brief in Opposition (p. 8). Respondent's Brief was filed with this Court approximately three months after the filing of *Yazell* and one month after its appearance in the official reports. And yet, nowhere in the Respondent's Brief does there appear the name of the case or its citation. It is difficult to imagine that such deception was unintentional. For the convenience of this Court, and perhaps that of counsel for Respondent, we have reproduced the *Yazell* decision and it is appended hereto as Appendix A.

---

*In the cases of *United States v. View Crest Garden Apts., Inc.*, 268 F. 2d 380, *cert. denied*, 361 U.S. 884 (1959), and 281 F. 2d 844, *cert. denied*, 364 U.S. 902 (1960); and *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253 and 296 F. 2d 534.

**In *United States v. Union Livestock Sales Co.*, 298 F. 2d 735.

***In *United States v. Yazell*, 334 F. 2d 454 (1964).

****E.g.: *United States v. Brosnan*, 363 U.S. 237; and *Meyer v. United States*, 84 S. Ct. 318 (1963).

Respondent has recently petitioned this Court for a Writ of Certiorari to review *Yazell*. The Petition contains the following:

"QUESTIONS PRESENTED

"1. Whether State or federal law is to be applied in determining the obligation of a married woman arising out of a contract executed under the Small Business Act of 1953.

"2. Whether, if federal law governs, the federal courts should fashion a uniform rule rather than adopt the diverse rules of coverture followed in the several States."

"STATEMENT

"The respondent, Ethel Mae Yazell, and her husband, were the recipients of a $12,000 loan made by the Small Business Administration pursuant to the federal program promulgated by Congress for the aid of small business (Small Business Act of 1953, 67 Stat. 232, as amended, 15 U.S.C. 631, *supra*.) The Yazells executed a note in the amount of the loan, together with a chattel mortgage on the merchandise in their jointly owned business. Upon default, the government foreclosed on the security and instituted this action against the co-makers of the note to recover the remaining deficiency. The district court entered summary judgment against Mr. Yazell in the amount of $4,719.66 (the outstanding unliquidated portion of the loan) but held that Mrs. Yazell, under Texas law, "based upon her defense of Coverture, is entitled to a summary judgment as a matter of law."

"Upon the government's appeal (Mr. Yazell did not appeal from the adverse judgment which had been entered against him), the judgment of the district court was affirmed by a divided court. The majority (Hutcheson and Jones JJ.) ruled that the Texas law of coverture controls and expressly disagreed with the Sixth Circuit's decision in *United States v. Helz*, 314 F. 2d 301 (holding that the defense of coverture accorded by State law is unavailable against the United States in an action brought

by it under the National Housing Act to recover on a federally insured loan). Judge Prettyman (sitting by designation) dissented. [The entire opinion is set out in Appendix A.]

"REASONS FOR GRANTING THE WRIT

"The federal government is engaged in various lending programs of national scope. Under the holding below, the obligations of those who enter into standard agreements pursuant to these programs would vary from State to State, depending upon local law. On the other hand, under the Sixth Circuit's rule, enunciated in the *Helz* case, the rights of the United States as lender are uniform throughout the country—which means, by the same token, that individuals throughout the country may be extended the privilege of participation on an equal basis. It is of obvious importance, we believe, that this acknowledged conflict be resolved and that the various lending agencies learn, at the earliest practicable date, whether their contracts are to be governed by fifty different sets of rules or by one set of rules. The difference that makes to the Administrator concerned needs no elaboration.

"Since the question is important and the conflict plain, we advert to the merits quite summarily. We point out that this Court has consistently ruled that the *Clearfield Trust* doctrine applies to all contracts of the United States as well as to the issuance of commercial paper. "The validity and construction of contract through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State," *United States v. Allegheny County*, 322 U.S. 174, 183. We recognize, to be sure, that this Court would be free to adopt, as a rule of federal law, the principle of reference to local law. *United States v. Brosnan*, 363 U.S. 237, 241. We shall argue, however,

> that such a rule would be particularly inappropriate here. It would, in our view, burden and complicate the administration of federal lending programs and tend to impair the achievement of objectives which are national in character." (Footnotes omitted.)

There can be no doubt that *Helz and Yazell* are in direct conflict. Further, there can be no doubt that *Yazell* and the decision here are in direct conflict. Respondent had earlier cited *Helz* to the Eighth Circuit as a case requiring the application of "federal law" to the facts of this case. To now state that *Yazell* is not in conflict with the decision here is to cast serious doubt on Respondent's citation of cases for any given proposition. The conflict is obvious and should be resolved.

The Position of Respondent in the case at bar and its position in *Yazell* are totally inconsistent. Here Respondent proclaims that the issues have been determined properly, that the decision does not conflict with any other Circuit decision, and that the issues here involved are not so important as to require review by this Court. Simultaneously, Respondent seeks review in *Yazell*, claiming that the decision there is erroneous, that it conflicts with other decisions of the Courts of Appeals, and that the issues involved are of such great importance that the decision should be reviewed by this Court. On issues which are identical, Respondent has seen fit to take diametrically opposed positions. The reasons, of course, are simple: Respondent prevailed in the Eighth Circuit and received an adverse decision in the Fifth Circuit. Although it is not surprising to witness this attempt to preserve a victory and reverse a defeat, the process by which this is sought to be accomplished necessarily eliminates a candid presentation of the issues to this Court. Petitions for Writs of Certiorari should not be, and are not, acted upon on the basis of victory or defeat for one of the parties.

We agree with the Respondent that the decision of the Fifth Circuit in *Yazell* and that of the Sixth Circuit in *Helz* are in direct conflict and should be reviewed by this Court. We only regret that Respondent has been unwilling to view objectively the decision here sought to be reviewed, and likewise urged the granting of a Writ of Certiorari.

2. The Brief of the Respondent has failed to take cognizance of the facts of this case. The Brief assumes that Respondent had established its right to the appointment of a receiver. This is in error. One need only glance at the Record herein to discover that there have been no showings of inadequacy of security, insolvency of the mortgagor, or even a default in the terms of the mortgage. *No evidence on these matters was offered by Respondent and no findings were made by the District Court.* The Record consists of a Complaint, an Answer, and an Application for the Appointment of a Receiver. To claim a default is to assert into the case the unsupported statement of counsel.

Respondent has cited no case, and presumably none exists, wherein it has been held that the mere application for the appointment of a receiver, by the United States, dictates such appointment. Every decision on the issue here involved, except the decision below, clearly holds that the party seeking the appointment must demonstrate that its security is in some way threatened. The failure to adopt this basic rule of law here places the decision below in direct conflict with *United States v. Queen's Court Apartments, Inc.*, 288 F. 2d 253, 296 F. 2d 534 (9th Cir. 1961), and *United States v. View Crest Garden Apartments, Inc.*, 268 F. 2d 380 (9th Cir. 1959), 281 F. 2d 844 (9th Cir. 1960).

3. Respondent asserts in its Brief that "this Court has consistently recognized that when the United States enters

into a large number of transactions *requiring uniform administration*, its rights and liabilities must be determined by reference to federal law." (Emphasis added.) This statement is also found in the opinion of the Eighth Circuit. As a theoretical proposition of law, it may be correct. But it cannot be applied to this or any other case unless and until it is demonstrated that the federal program involved does in fact "require uniform administration." This is the central issue to be determined.

The relevant facts all demonstrate that there is no need for uniformity here. Since Respondent cannot prove such a need, he urges this Court to *assume* it to exist. *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), compels no such result.

Respondent obtained an opinion below based upon such an unproven assumption. To thus assume the sole basis for decision is not only inconsistent with the judicial function, but places the decision below, as well as those decisions from the Ninth Circuit, *supra*, in direct conflict with the Fourth Circuit's decision in *United States v. Union Livestock Sales Co.*, 298 F. 2d 755 (4th Cir. 1962):

> *"We find no need for uniformity in these transactions throughout the United States.* On the contrary, it seems to us that the interest of the Government and of the borrower will be properly protected if the local rules governing dealings in the transfer of property, which have been built up by the experience in like transactions and are familiar alike to the courts and the citizens of the several localities, are given application." (298 F. 2d at 759) (Emphasis added.)

4. Respondent also asserts, as it did in the Court below, that "the desirability of a uniform rule is plain." Such is not the case. No public monies are here involved. The FHA in-

surance program is profitable. The funds in reserve are derived from premiums paid by the mortgagor. No protection and no uniformity are required. "Protection of the Government's financial interest" has been secured by a charge for premiums which has produced a reserve far in excess of any anticipated needs.

Respondent declares that it is engaged in a nationwide insurance business. In such respect it is in no different situation than a great variety of banks, insurance companies and other financial institutions similarly engaged. Mortgages held by all such institutions are governed by the laws of the various states in which the property is situated. Such considerations do not seem to interfere with the orderly conduct of their business.

The matter can be easily documented. Respondent recites (p. 7) that by 1961 *all* FHA insured mortgages outstanding exceeded 6.5 billion dollars. Some related data on mortgages will be illustrative. The year in each instance is 1961.

Total farm mortgage debt	$ 12,812,000,000*
Farm mortgage debt held by insurance companies	2,375,000,000
Farm mortgage debt held by banks	1,686,000,000
Total real estate mortgages held by insurance companies	44,203,000,000
Net private non-farm mortgage debt	190,100,000,000.

Of the last figure, approximately $153,083,000,000 represents mortgages held on 1 to 4 family non-farm homes.

It can be safely assumed that at least the insurance companies insist upon some geographic diversification of mort-

*All figures are from the *Economic Almanac 1964*, National Industrial Conference Board, pp. 172, 408, 459, 461.

gage holdings. In any event, if we assume that all of the FHA insured mortgages and loans are private non-farm mortgages, the net of such non-FHA insured mortgages in 1961 exceeded 184 billions of dollars. Mortgagees holding that size investment somehow manage to accommodate themselves to "the vagaries of the laws of the several states."

It is difficult to imagine that Respondent cannot accommodate itself to the same financial and legal aspects of the mortgage business as do all others who hold mortgages on real estate in various places in the United States.

Respondent's claimed involvement of 6.5 billion dollars is grossly misleading. In 1962, .31 of 1% of the Title 608 units were in default, and only .06 of 1% of the units insured were being assigned.* If the unit figure is correlative to dollars involved, the FHA's concern in *really only $3,900,000.* If we assume that each one so assigned is realized only to the extent of 50%, this "vast" program amounts to $1,950,000.

5. Respondent has ignored, as did the Court below, the language of the Regulations relevant to the issues here:

"1949 Edition, Code of Federal Regulations, §280.18:

> "The mortgage must contain a provision or provisions satisfactory to the Commissioner, giving to the mortgagee, in the event of default or foreclosure of the mortgage, such rights and remedies for the protection and preservation of the property covered by the mortgage and the income therefrom, *as are available under the law or custom of the jurisdiction.* (Emphasis supplied.)

"1949 Edition, Code of Federal Regulations, §382.2 (c):

> "The term 'mortgage' means such first lien upon real

*Housing and Home Finance Agency, *16th Annual Report*, Table III-27.

estate and other property as is commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate *under the laws of the State, District or Territory in which the real estate is located,* together with the credit instrument or instruments, if any, secured thereby. (Emphasis supplied.)

"1949 Edition, Code of Federal Regulations, §282.8 (b):

"(2) Institute proceedings for the foreclosure of the mortgage and obtain possession of the mortgaged property and the income therefrom through the voluntary surrender thereof by the mortgagor or institute, and prosecute with reasonable diligence, *proceedings for the appointments of a receiver of the mortgaged property and the income therefrom* or proceed to exercise such other rights and remedies as may be available to it for the protection and preservation of the mortgaged property and the income therefrom *under the mortgage and the law of the particular jurisdiction: Provided, that if the laws of the State in which the mortgaged property is situated do not permit the institution of such proceedings within such period of time, the mortgagee shall institute such proceedings within sixty (60) days after the expiration of the time during which the institution of such proceedings is prohibited by such laws.* (Emphasis added.)

To read the above Regulations and conclude that "there is no indication that the right to obtain foreclosure is to be governed by State law," as Respondent has concluded, is a striking example of the proposition that there are "*none so blind as those that will not see.*"

CONCLUSION

Respondent proclaims strenuously for the application of a uniform federal rule. It is doubtful that such uniformity could ever be achieved in this field which is "an area of complex property relationships long since settled and regulated by state law." *United States v. Brosnan*, 363 U.S. 237 (1960). The Court there continued:

> "We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests by displacing well-established state procedures governing their enforcement, or super-imposing on them a new federal rule."

As stated in Mishkin, *The Variousness* of "Federal Law," 105 U. Pa. L. Rev. 797, 831:

> "The only real gain would seem to be in the work of legal counsel to the Treasury [here FHA] and in a certain symmetry of the law. While both of these certainly have appeal and perhaps some real value, this importance may be overrated."

No need for uniformity having been shown, State law must be applied. The decision below should be reversed.

Respectfully submitted,

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota 55101

BRIGGS AND MORGAN
First National Bank Building
St. Paul, Minnesota 55101
Attorneys for Petitioner

APPENDIX A

UNITED STATES OF AMERICA
Appellant

v.

DELBERT L. YAZELL, D B A YAZELL'S LITTLE AGES, and ETHEL MAE YAZELL
Appellees

No. 21154

United States Court of Appeals
Fifth Circuit

July 13, 1964

Before HUTCHESON, PRETTYMAN, and JONES, Circuit Judges.

HUTCHESON, Circuit Judge:

This appeal is by the United States from a judgment sustaining the appellee's defense of coverture on a note executed under a contract entered into under a federal program authorized by congress for the aiding of small business. The suit was against appellee and her husband, and the judgment against the husband is not appealed from. The sole issue was and is whether the law of Texas, where the contract was made, that a married woman is protected by coverture from personal liability upon a contract, is controlling here, or whether, since the transaction was a transaction with the federal government, the Texas law of coverture is nullified and abrogated.

The district judge, sustaining Mrs. Yazell's plea of coverture, followed Texas law as it has been uniformly declared:

> "*With the adoption of the common law as the rule of decision in this state, in 1840, our married women were rendered unable to bind themselves by contract.* Kavanaugh v. Brown, 1 Tex. 481. And although by statute we

> retained the Spanish law rule that the wife can own property, our adoption of the common law meant that she can contract with respect to it or otherwise only for a purpose pointed out by law and only in such manner as our statutes may permit. Graham et al. Struwe (Struve) et al., 76 Tex. 533, 13 S.W. 381; Speer's Law of Marital Rights, 3rd Ed., Sec. 167, p. 226." (Emphasis added.) Tolbert v. Standard Acc. Ins. Co., 148 Tex. 235 at p. 238, 223 S.W. 2d 617 at 619.

and the Texas law of coverture is the controlling law. This applies just as well to government groups and the United States as to anybody else. In short, this is not a case like the cases relied on by the United States of federal commercial paper issued by and as an obligation of the United States. This is a simple case of trying to hold a married woman liable on a contract which under the laws of Texas she was incapable of making, and the claim is no more reasonable than to hold that a minor, or one of unsound mind, could be held liable on a contract despite his disability merely because the United States was a party to it. There is nothing in this view, and we are in no doubt that the decision of the district judge should be affirmed.

The contention of the United States, that because the promissory note sued on was payable to The Small Business Administration, the Texas law as above set forth is not controlling here, is completely unfounded, and we reject as without authority here the opinion of the Sixth Circuit, in United States v. Helz, 314 F. 2d 301, as we reject appellant's contention that the fact that the Small Business Administration is a party to the note sued on nullifies or has any effect on the incapacity of Mrs. Yazell to bind herself by contract.

The district judge was right in his decision. His judgment is affirmed.

PRETTYMAN, Senior Circuit Judge (dissenting):

Mrs. Yazell and her husband, trading as a partnership, borrowed money from the Federal Government through the Small Business Administration. They signed a note for the loan. They also signed, as security for the loan, a chattel mortgage on the merchandise in their store. They could not pay, and the Government foreclosed on the security. A deficiency remained. The Government sued on the note, praying judgment for the balance of the loan. Mrs. Yazell moved for summary judgment on the ground that she is a married woman and so, in Texas, no personal judgment and no judgment affecting her separate estate can be rendered against her, with a few exceptions not here material. The District Court judge agreed with her, and so do my brethren on this court. I am contrari-minded.

A loan from the Federal Government is a federal matter and should be governed by federal law. There being no federal statute on the subject, the courts must fashion a rule. This is the clear holding of Clearfield Trust Co. v. United States.

To effectuate the policy of the Small Business Act, loans of many hundreds of thousands of dollars each year to businesses must be made throughout the country. These loans can be made only under conditions which will reasonably assure repayment. I think the Act should be of uniform application throughout the country. If local rules are to govern federal contracts in respect to the capacity of married women to contract, so too should local rules as to all other features of contractual capacity govern such contracts. Chaos which would

nullify federal programs for disaster relief would arise. And of course there is no reason to restrict this decision to loans under the Small Business Act. It would necessarily apply with equal force to every other federal program which involves contracts between the Federal Government and individuals. A multitude of programs will be frustrated by it.

It seems to me that, if a person has capacity to get money from the Federal Government, he has the capacity to give it back. The present lawsuit does not involve a general liability for debt; it involves merely the obligation to repay to the Government specific money borrowed from the Government. It seems to me that if a person borrows a horse from a neighbor he ought to be required to give it back if the owner wants it back, whether or not the borrower is a married woman. I suppose the Texas law, by nullifying repayments by married women, tends to minimize ill-advised borrowing. But I think the federal rule ought to be that you must repay what you borrow.

It seems to me that United States v. Helz was correctly decided by the Sixth Circuit and that it applies here. I would follow it. (Citations omitted.)

MOTION FILED

JAN 27 1965

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING; AND PETITION FOR REHEARING

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota 55101

BRIGGS & MORGAN
First National Bank Building
St. Paul, Minnesota 55101
Attorneys for Petitioner

CApitol 2-2701 — Review Publishing Co., 241 E. 5th St., St. Paul 1, Minn. — CApitol 2-2701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner moves for leave to file the attached petition for a rehearing of this Court's Order dated November 9, 1964, denying the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. This motion is made because, as more fully shown by the attached petition for rehearing, this Court, on January 18, 1965, granted the petition for a writ of certiorari in *United States v. Yazell*, 334 F. 2d 454 (No. 575, October Term, 1964).

The questions presented for review in *Yazell* are substantially identical to the questions sought to be reviewed in the case at bar.

Having granted review in *Yazell* subsequent to the denial of the petition for a writ of certiorari in this case, the Court should reconsider its order of November 9, 1964, and grant a review of both cases. A review of both decisions will allow the Court to determine properly the important and difficult conflict between state and federal law.

Respectfully submitted,

D. D. WOZNIAK
Minnesota Building
St. Paul, Minnesota

BRIGGS & MORGAN
First National Bank
Building
St. Paul, Minnesota
Attorneys for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 418

Civil

CHESTER PARK APARTMENTS, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

Petitioner presents its petition for rehearing of this Court's order dated November 9, 1964, denying the petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

On January 18, 1965, this Court granted a writ of certiorari, previously petitioned for by the United States, in *United States v. Yazell*, 334 F. 2d 454 (No. 575, October Term, 1964). The Fifth Circuit Court of Appeals held there that the Texas law of coverture was a valid defense to a suit brought by the United States under the National Housing Act to recover on a federally insured loan.

The questions presented in the petition for a writ of certiorari in *Yazell* are the following:

> "1. Whether State or federal law is to be applied in determining the obligation of a married woman arises out of a contract executed under the Small Business Act of 1953."
>
> "2. Whether, if federal law governs, the federal courts should fashion a uniform rule rather than adopt the diverse rules of coverture followed in the several States."

The question presented for review in this case is the following:

> "May the Court, pending a mortgage foreclosure, appoint a receiver to collect rents and profits of the mortgaged premises in a situation in which:
>
> (i) an FHA insured mortgage between private parties contains a provision authorizing such an appointment upon default;
>
> (ii) such provision is invalid and unenforceable under the law of the situs; and
>
> (iii) there is no showing of waste, inadequacy of security, insolvency of the mortgagor, and no delay existent or prospective in the foreclosure proceedings?"

The United States has framed the question here as follows:

> "Whether, in an action by the United States to foreclose a war housing insured mortgage, federal law governs the right of the United States to enforce an express provision of the mortgage for the appointment of a receiver of the rents of the mortgaged property [where it is conceded that State law prohibits such appointment]." (Br. Op. 2.)

A brief summary of the factual setting of the case at bar will demonstrate the necessity of granting this petition for rehearing and vacating the Court's order of November 9, 1964, denying the petition for a writ of certiorari.

Petitioner executed a mortgage in favor of Manufacturers Hanover Trust Company to secure a debt of $1,328,400. The mortgage was insured by the FHA pursuant to Section 608 of the National Housing Act, 12 U.S.C. 1743. On September 18, 1963, the mortgagee assigned the mortgage note and the security instruments to the Federal Housing Commissioner pursuant to Section 608(c), 12 U.S.C. 1743(c). On November 19, 1963, respondent commenced a mortgage foreclosure action on behalf of the Federal Housing Commissioner, invoking the jurisdiction of the District Court pursuant to Title 28 U.S.C. §1345. It was alleged that default had occurred in the terms of the mortgage, and the complaint prayed for foreclosure of the security instruments, sale of the property and the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings.

A separate application for the appointment of a receiver pending the foreclosure proceedings was based upon the following term contained in the mortgage itself:

> "[The mortgagee] shall be entitled to the appointment of a Receiver of the rents and profits of the mortgaged prem-

> ises as a matter of right and without notice, with power to collect the rents, issues and profits of said mortgaged premises * * * such rents and profits being hereby expressly assigned and pledged as additional security for the payment of the indebtedness secured by this mortgage."

On March 19, 1964, the District Court entered an order refusing to appoint a receiver, and certifying that the question was appropriate for interlocutory appeal. The Eighth Circuit Court of Appeals permitted such an appeal to be prosecuted, reversed the District Court, and ordered the appointment of a receiver.

The Court of Appeals held that federal law governed the enforceability of the FHA insured mortgage, stating that the issue before it was "whether federal or state law controls the enforceability of the agreement providing for the appointment of a receiver to collect rents during the pendency of the foreclosure proceedings." *The United States has conceded that under Minnesota law the mortgage provision here in question would be unenforceable.*

It is the position of petitioner here that the fundamental issues sought to be reviewed in the case at bar and in *Yazell* are identical, and the disparity of treatment of the two cases, in granting a petition for a writ of certiorari in one and denying the same in the other, is unjustified. Both cases should be reviewed by this Court.

By granting review in *Yazell*, this Court will be called upon to determine an important and difficult question of federal law. The decision in *Yazell* will have far-reaching consequences, including a tremendous impact upon traditional rights, and upon important aspects of the state-federal spheres of control. All federal programs necessarily will be affected

The issues in *Yazell* and the case at bar are so substantially identical as to call for simultaneous review by this Court.

Not only does petitioner have its own substantial rights involved in this case, but also involved are the rights and obligations of all parties who are participants in "federal" programs. Such rights should not be affected by a decision of the Court on the narrow issue of the Texas law of coverture. The basic issue involved should be viewed as broadly as possible, with a full understanding of the consequences of a decision in this area. The granting of the petition for rehearing will afford this Court the opportunity to examine the basic question involved in a more comprehensive and satisfactory manner than would be possible under a review of *Yazell* alone.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

D. D. WOZNJAK
Minnesota Building
St. Paul, Minnesota

BRIGGS & MORGAN
First National Bank
Building
St. Paul, Minnesota

Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, D. D. Wozniak, attorney for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

D. D. WOZNIAK
Attorney for Petitioner